U.S. Department of Labor

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Issue Date: 06 July 2004

CASE NUMBER: 1997-LHC-1408

OWCP NUMBER: 08-111782

IN THE MATTER OF

ROBERT W. DODD,
Claimant

v.

CROWN CENTRAL PETROLEUM CORP.,
Employer

and

LIBERTY MUTUAL INSURANCE CO.,
Carrier

APPEARANCES:

Robert W. Dodd,
Pro Se

Andrew Z. Schreck, Esq.
Henslee, Fowler, Hepwork & Schwartz
On behalf of Employer/Carrier

DECISION AND ORDER DENYING EMPLOYER'S REQUEST FOR MODIFICATION

This proceeding involves a request for modification filed by Employer/Carrier on June 19, 2003, seeking a determination that: (1) since the

undersigned's June 14, 2001 order, Claimant's mental and physical condition has improved such that he has the capacity to work, and thus, is not entitled to permanent and total disability benefits, and, (2) Employer is not responsible for paying either compensation or medical benefits associated with Claimant's mental impairment (depression), allegedly because this condition was caused not by knee pain following a October 24, 1995, work injury, but as a result of Employer's legitimate personnel decision to question the validity of and deny benefits associated with the right knee work injury.

On June 25, 1999, the Benefits Review Board remanded this case to the undersigned, finding that Claimant had established a *prima facie* of injury and directing consideration of whether Employer had rebutted the Section 20 (a) presumption, and if so, to determine after weighing all the evidence whether there was a casual relation between Claimant's condition and his work injury, and if, so the nature and extent of Claimant's injury. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); see *Director, OWCP v. Geenwich Collieries*, 512 U.S. 267 (1994). On January 10, 2000, the undersigned issued a Decision and Order on Remand finding Claimant entitled to temporary total disability from February 5, 1996 to October 25, 1996, and permanent partial disability from October 26, 1996 for a period of 43.2 weeks in accordance with Section 908 (c)(2)(19).

Thereafter, Claimant filed a request for modification, claiming a change in his condition (total disability from the original date of injury). On June 14, 2001, the undersigned issued a Decision and Order Granting and Denying In Part Claimant's Petition for Modification, finding in part that Claimant was not entitled to benefits from October 25, 1995 to January 16, 1996 when Claimant performed light duty for Employer, but, was entitled to temporary total disability from January 17, 1996 to October 25, 1996 and permanent total disability from October 26, 1996 to present. On July 29, 2002, the Board issued a Decision and Order affirming in part the award of total disability from January 17, 1996, but remanding for the purpose of determining whether Claimant was entitled to a period of temporary partial disability for the period from October 25, 1995 through January 16, 1996. Claimant filed a timely motion for reconsideration which the Board, by Order, denied on January 28, 2003. At fn.4 of that Order the Board stated:

> The rest of claimant's motion for reconsideration is an attempt to have the Board hold that employer's right to participate before the Board should be abridged due to some untimely filing on

> employer's part. Similarly, claimant contends that the employer may not seek modification before the administrative law judge. These conditions are without merit. *See* 33 U.S.C. § 922; 20 C.F.R. §§ 702.373, 802.217.

On June 10, 2003, the undersigned issued a Decision and Order on Second Remand, finding in part, that Claimant was entitled to temporary partial disability pursuant to 33 U.S.C. § 908 (e) of the Act for the period from October 26, 1995 to November 6, 1995, based on an average weekly wage of $1,180.18 and a post-wage earning capacity of $814.80, resulting in a weekly compensation rate of $243.59.

The issues raised by Employer's request for modification could not be resolved administratively, and the matter was referred for formal hearing which was held before the undersigned on March 8, 2004, in Houston, Texas. At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant represented himself and testified, but offered no exhibits. Employer/ Carrier was represented by counsel who examined Claimant, called witnesses; Dr. Victor Scarano, Jack Williams, and William L. Quintanilla, and introduced 12 exhibits including medical records of Drs. A.R. Garcia, and David Suchowiecky, reports of Drs. Scarano and Robert Harper, and a vocational report of William Quintanilla.[1]

II. ISSUES

The parties presented the following unresolved issues:

1. Whether Employer filed a timely and otherwise appropriate petition for modification.

[1] References to the transcript and exhibits are as follows: Trial transcript – Tr._____; Employer exhibits –EX-____p.___.

2. Whether Employer established that Claimant's physical or mental condition improved since the undersigned's June 14, 2001 Order, such that Claimant is employable, and thus, has an increased wage earning capacity.

3. Whether Claimant's ongoing depression is causally related to knee pain caused by an October 24, 1995, work-injury, rather than Employer's personnel decision to contest and deny benefits for this injury.

III. STATEMENT OF CASE

A. Chronology

The chronology was initially set forth in the undersigned's June 3, 1998 Decision and Order Denying Benefits. Briefly the record shows Claimant now to be a 60 year old male worked for Employer from October 1, 1982 until February 5, 1996, when Employer in an effort to prevent sabotage of plant equipment, locked out all refinery workers including Claimant, who were represented by the Oil, Chemical and Atomic Workers Union. (OCAW). Prior to the lockout, Claimant was working as a pumper/dock standby responsible for hooking up lines for the transfer of petroleum products from barges into the plant while supervising unloading operations. On October 25, 1995, while assisting in unloading operations, Claimant injured his right knee as he was hurrying to get a tankerman's attention to immediately open a valve. Claimant reported the injury to Lloyd S. Dempsey, loss control operator and terminal foreman, J.W. Troppy who applied an ice pack to the knee and took Claimant to the emergency room of Southmore Medical Center where he was treated conservatively for a sprained joint and knee with recommendations for use of ice, elevation, ace wrap, rest, crutches, motrin, and light duty until released by a company doctor.

On October 26, 1996, Claimant saw Employer recommended orthopedist, Dr. Mathis. The physical exam showed Claimant to be 5 feet 11 inches and morbidly obese weighing 300 pounds and having difficulty getting off the examining table. Dr. Mathis' impression after reading the x-ray was right knee pain, soft tissue calcification with no evidence of any avulsion fracture or significant joint effusion. Dr. Mathis treated Claimant on 3 additional occasions: November 6, 1995, January 8, and 18, 1996. On the January 8, 1996 visit, Claimant complained of constant knee pain with evidence of joint effusion and a positive patellar crunch. Dr. Mathis' impression was patello femoral degenerative

joint disease. By January 18, 1996, Claimant was complaining of increased knee pain, but had minimal objective findings (mild patello femoral crepitus and medial joint line tenderness. (June 3, 1998, Decision and Order Denying Benefits, p. 4).

On January 18, 1996, Claimant switched treating physicians choosing family practitioner, Dr. Garcia, who saw Claimant on 6 occasions (January 19, February 19, March 12, 27, May 16, June 18, and July 23, 1996). Dr. Garcia referred Claimant to orthopedist, Dr. Landon, who saw Claimant on 7 separate occasions (February 6, 19, September 26, October 25, 1996, June 23, July 14, and August 25, 1997), and operated on Claimant's right knee on March 5, 1996, performing an arthroscopy, debridement and partial synovectomy. A letter of June 11, 1996, from Dr. Landon to David Holmes showed Claimant to have post-traumatic arthritis. By September 26, 1996, Claimant's symptoms had improved. Claimant reached maximum medical improvement on October 25, 1996. However, as of the last visit, of August 25, 1997, Claimant was severely depressed requiring Dr. Landon to make an urgent referral to a psychiatrist. Claimant testified that he experienced depression as a result of his mother's death on September 9, 1995, a divorce on December 6, 1996, and the inability to work because of his knee condition. (June 3, 1998, Decision and Order Denying Benefits, pp. 5, 6, 7).

Further treatment for depression is set forth in the undersigned's June 14, 2001, Decision and Order Granting and Denying in Part Claimant's Petition for Modification. On modification, Claimant contended that he was permanently and totally disabled due to orthopedic and pain complaints, plus severe depression associated with his knee injury. The record in that proceeding shows Claimant being treated for depression by psychiatrist Dr. Sandra N. McElroy, on July 30, and October 27, 1997, and March 26, 1998. Dr. McElroy diagnosed a depressive disorder with job related stresses from injury and unemployment contributing to the depression. At that time Claimant was complaining about crooked lawyers and was abusing alcohol. Counselor Susan M. Landers also treated Claimant for depression and alcohol abuse and recommended psychiatric treatment.

On April 7, 2000, psychologist, Dr. John W. Largen administered a battery of tests to Claimant showing Claimant to have a full scale I/Q of 102 with intact cognitive and academic functioning, sufficient resources to comprehend his present situation, problem solve and communicate effectively, but with significant memory difficulties secondary to severe depression and anxiety. Dr. Largen diagnosed major depressive disorder with anxious features and strongly recommended continued psychiatric treatment with a combination of psychotropic medication and psychotherapy with Claimant at an increased risk for suicide and a need to

address strong feelings of anger, depression and anxiety. On April 11, 2000 psychiatrist, Dr. Ihsan Shanti evaluated Claimant and diagnosed depression with right knee pain and gave a global assessment of functioning (GAF) of 58 with recommendations for 30 sessions of pain management using multiple therapeutic modalities to more effectively deal with pain and mood disturbance. (June 14, 2001, Decision and Order Granting and Denying in Part Claimant's Petition for Modification, p.7).

On May 5, 2000, Claimant returned to Dr. Garcia who noted that the right knee was feeling better, but the exam was essentially unchanged with Claimant weighing approximately 289 pounds and status post right knee injury with depression. Claimant returned to Dr. Garcia on June 6, 2000 with complaints of depressive symptoms and anxiety. The record contains conflicting comments regarding pain with an initial comment of no pain and dysfunction followed by full range of right knee motion and no joint tenderness to an impression of depression and chronic right knee pain with degenerative joint disease. On June 14, 2000, Claimant returned to Dr. Garcia with complaints of right knee pain. (EX-1, pp. 3-6).

Claimant's next visit to Dr. Garcia was on June 19, 2003. Notes from that visit, show Claimant being treated by Dr. Suchowiecky over the past three years for depression with Claimant's right knee then feeling much better, but with complaints of left knee pain. Dr. Garcia's impression was right knee pain status post injury and depression with recommendations for continued use of all medications. (Id. at 2). On Claimant's last visit Dr. Garcia notes that Claimant had full range of motion and minimal tenderness of the right knee, crepitance of the left knee, right knee pain status post arthroscopy with recommendation for aqua therapy and continued use of medication. (Id. at 1).

Although Dr. Suchowiecky apparently treated Claimant over a three year period, Employer chose to introduce records only from February 15, 2001 through June 25, 2001. In a report dated May 9, 2001, Ms. Mary Ann Spires, Director of Physical Rehabilitation Services stated:

> Since the initial hearing on January 13, 1998, Mr. Dodd's mental condition has changed slightly in that he no longer has suicidal ideation. He has been utilizing pain management coping techniques to cope with his pain. He also has increased self-esteem and positive expectations about the future. However, his frustration and irritability continues due to his workman's comp

> issues. His depression is still present due to his impaired functionality and pain but not as severe.
>
> A Functional Capacity Evaluation (FCE) was performed on 2/21/01, which demonstrated that he was able to work at a light physical demand level according to the *Dictionary of Occupational Titles*, U.S. Department of Labor, 1991. His past work as a pumper/dock standby is classified on the medium physical demand level (according to the Dictionary of Occupational Titles). His pain level also increased during the FCE, which indicates that should he return to increased physical activity with his past work, he has an increased risk of re-injury.
>
> His depression can affect the reliability of his attendance to work as well as the quality of work since his energy level fluctuates.
>
> Mr. Dodd has participated in a pain management program, which has helped to decrease his depression, increase his coping skills, increase his self esteem, and decrease his pain level. Since his participation in the pain management program, he no longer has suicidal ideation. Dr. Largent, who evaluated Mr. Dodd, assigned him a 25% impairment rating in terms of psychiatric and psychological functioning.
>
> In light of Mr. Dodd's decreased physical ability, it is recommended that he participate in a work conditioning/work hardening program to increase his functionality, stamina, and improve his body mechanics to prevent re-injury and potentially allow Mr. Dodd to return to gainful employment.

(EX-2, pp 29, 30).

In a subsequent report of May 30, 2001, Claimant continued to complain of knee pain. Claimant was concerned about a return to work because of the possibility of re-injury. Nonetheless, Claimant continued performing the required exercises but at a slower pace due to long term inactivity and severe pain. (EX-2, pp. 31, 32).

B. Claimant's Testimony

In order to establish its case that Claimant's depression was not work related or due to knee pain, Employer's counsel called Claimant as its first witness. On cross, Claimant described his dockside duties to include: manually hooking up lines to tankers and barges for the discharge of cargo (primarily crude oil) into refinery tanks, opening tanks and valves, climbing towers 300 to 400 feet high, and walking up and down gravel roads, filling out log sheets, and issuing work permits. (Tr. 21-41). Claimant testified that he was not able to do the physical demands of the job because of injuries to not only the right but the left knee, which Claimant had injured in 1992 while working for Employer. Following the right knee injury Claimant failed a physical exam administered by Dr. Hancock. Had he passed that exam, Claimant testified he would have tried to perform his dockside job. (Tr. 41-43).

Claimant admitted that he: (1) was upset with Employer's action in denying worker's compensation benefits, (2) went through a work hardening process at Dr. Suchowiecky's office from May through July, 2001, but was not able to complete it because Employer refused to pay for it and due to deteriorating physical condition; (3) on occasion told Dr. Garcia he had minimal tenderness in right knee but nonetheless continued to have pain in it; (4) lost his mother to Parkinson's disease and became embroiled in litigation with siblings over probate of her estate; and (5) got divorced and had a son imprisoned. (Tr. 45, 47, 51-53).

Claimant disagreed with Employer's medical expert, Dr. Scarano that he could work in that Dr. Scarano failed to consider the problems associated with both knees, plus Claimant's underlying problems of sleep apnea, alcoholism and depression, and pain. Claimant testified that depression and sleep apnea affected his alertness which was necessary to prevent refinery fires. (Tr. 64-72). Claimant admitted that he was "consumed" by Employer's denial of treatment for his knee injury. (Tr. 83). Claimant also admitted sending out e-mails telling other employees to "ham up" injuries when being surveilled so as to provide a sense of humor to those confronted with suicide due to work comp injuries. (EX-10). Claimant stated that private investigators were not interested in the truth but rather "catching people doing something." (Tr. 77). Claimant admitted turning down a security guard position offered him at Employer's facility, because Employer

controlled the contract security service including those hired and let go. (Tr. 86, 87).

Concerning the issue of pain, Claimant testified that as long as he remains sedentary and stays off his feet he does not have chronic, daily pain. However, when he becomes more active, such as trying to go to the gym and exercise he has to wrap the knee, and use a hot whirlpool, and then is incapacitated for several weeks. (Tr. 142, 144). Claimant testified that he will have about 2 to 3 bad days a week with severe pain where he is prevented from walking. Claimant's daily activities are limited to heating coffee, occasionally going to the post-office, grocery store, and movie, and son's house. In addition, Claimant occasionally elevates his feet, watches TV, cooks, and collects coins. Claimant testified that he cannot walk on uneven surfaces, can walk about 5 minutes before sitting down to rest, and has difficulty moving around once he gets up from a seated position. (Tr. 143-153).

C. Testimony of Dr.Victor Scarano

Employer's first witness, Dr. Victor Scarano, Chief of Forensic Psychiatry and Director of Occupational and Forensic Psychiatry, Meninger Department of Psychiatry, Baylor College of Medicine, conducted a psychiatric examination /evaluation of Claimant on January 20, 2004 followed by a psychological and neurological evaluation by psychologist, Dr. Robert G Harper. (Tr. 100-104). On February 6, 2004, Dr. Scarano issued a 21 page, 10 part report which included a Claimant interview, review of Claimant's medical records as provided by Employer's counsel, mental status exam, cognitive function testing, and a psychological/neuropsychological by psychologist, Dr. Robert G. Harper, followed by a discussion, diagnoses, and conclusion. Besides a mental status exam, Dr. Scarano administered the following tests: Trails A & Trails B; Mini Mental Examination, similarities, Rey Fifteen Item Memory Test, Hamilton Depression Scale, and Center foe Epidemiologic Studies Depression Scale.

Dr. Scarano diagnosed Claimant as suffering from the following: Axis 1– major depressive disorder (partial remission); Axis II-features of passive-aggressive and depressive personality disorder; Axis III-history of hypertension, obesity; Axis IV-distress related to ongoing legal suit; Axis V- global assessment

of functioning scale-50. [2] Dr. Scarano ended his report by opining that to a reasonable degree of medical certainty that Claimant's major depressive disorder which is in partial remission, was due to Claimant's ongoing claim litigation made worse by obesity and alcoholism. Dr. Scarano further opined that Claimant's depression did not prevent Claimant "from working in a job that he is physically capable of undertaking. In essence, Dr. Scarano found that the major cause of Claimant's depression was his ongoing worker's compensation claim exacerbated by obesity, alcoholism and characterological makeup. Dr. Scarano apparently discounted knee pain as a cause of the depression by Claimant's comments that Dr. Suchowiecky's treatment had improved both his knee pain and level of depression. (EX-3, 4, 5).

Dr. Scarano's report also included a summary of psychological/neuropsychological testing of Claimant by psychologist, Robert G. Harper, on January 20, 2004. Dr. Harper Wais-III testing revealed similar IQ scores obtained by Dr. Largen in April, 2000. Dr. Harper did limited memory testing, although Claimant asserted memory problems with preliminary findings suggesting marginal memory functioning. While finding no expressive or receptive language deficits, Dr. Harper noted mild executive-cognitive deficits. MMPI testing showed marked elevated clinical scale for depression, health-related anxiety and utilization of denial/repression as a psychological defense leaving Claimant vulnerable to somatization of emotional distress. Dr. Harper also noted that Claimant displayed prominent passive-aggressive and obsessive compulsive character traits contributing to interpersonal conflict and failure to recognize aggressive impact of negativistic behavior. Dr. Harper also noted that Claimant had a strong need for control accompanied by fears of inadequacy, aversion to reliance and dependence upon others and loss of mastery. (EX-5, pp. 17, 18; EX-6). In summary, Dr. Harper diagnosed major depression which was being incompletely treated with antidepressants which condition (affective distress) appears to stem from the time of his work-related injury. (EX-6, p. 4).

Dr. Scarano's testimony mirrored his report. Dr. Scarano described the 5 axis mental assessment of Claimant, which included major psychiatric problems (depression), followed by personality disorder, physical problems and stress factors and concluding with a global assessment of functioning (GAF). Dr. Scarano

[2] According to the *Diagnostic and Statistical Manual of Mental Disorders, 4th ed DSM-IV p*ublished by the American Psychiatric Association at page 32 a global assessment of functioning (GAF) considers psychological, social and occupational functioning. A score of 50 is classified as involving serious symptoms, (e.g. suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational or school functioning (e.g. no friends, unable to keep a job.)

testified that the 1995, 1996 episode of depression was caused by a number of factors including the death of his mother, probate court fight with family members, and divorce. (Tr. 106-111). Dr. Scarano found Claimant to be candid, alert, awake, oriented to time, place, and person, but demonstrating especially on the MMPI test marked depression and anxiety. (Tr. 112-120). Dr. Scarano testified that Claimant's current depression was due to his legal battles over compensation, and not because of any knee pain with additional contributing factors of alcohol, obesity, and sleep apnea and that he could return to his former job from a mental health standpoint. (Tr. 122-125).

On cross, Dr. Scarano testified that Claimant told him his left knee was "ok." And further, that he asked Claimant if right knee pain was the cause of his depression. (Tr. 127, 128). Dr. Scarano admitted that he evaluates people that have pain or have had pain management, but does not provide pain management. (Tr. 136). Further when asked what work limitations he would impose on Claimant given his evaluation, Dr. Scarano said that he could work full time, but would have to take off on bad days and estimated 12 such days a year. (Tr. 155, 156). However, with regard to alcoholism, Dr. Scarano testified that Claimant would have to go through an alcohol rehab program and be alcohol free. (Tr. 156). There is no evidence of any such treatment.

D. Testimony of Jack Williams

Employer called Jack Williams, President of Industrial Investigation & Security Inc., which company provides security services for Employer. Williams testified in July of 2001, he offered Claimant a security guard position at Employer's facility. According to Williams, the security position accommodated Claimant's physical restrictions and was kept open from July 12, 2001 to July 20, 2001. (EX-9, p. 3).

Williams testified that he offered the job to Claimant at the request of William R. Tyler, Employer Human Resource Manager. (Tr. 172). Tyler notified Claimant on July 11, 2001, that the security guard position involved sedentary, unarmed security work at Employer's tank farm with a starting pay of $6.50 per hour. (EX-9, p. 1). As described by Employer, the security officer's gate position involved the following 10 duties:

1. Provide client security access and control, entry and exit.

2. Maintain visitor and employee entry and exit log sheets.

3. Provide site communication for client utilizing telephone and radio equipment.

4. Provide assistance with traffic at entry point during emergency situations.

5. Provide surveillance along Red Bluff Road.

6 Verify work order and vendor identification for entry into Tank Farm.

7. Maintain professional image for client and employer.

8. Write incident reports associated with tank farm access.

9. Report to Main Security Officer any trespass or breech of security associated with the tank farm.

10. Operate security vehicle to patrol tank farm perimeters as requested.

(EX-9, p. 2).

Williams testified the position offered Dodd was called a post-officer or gate guard job and paid $8.00 per hour as opposed to $6.50 per hour as Tyler stated, and involved sitting most of the time with the opportunity to alternate between sitting and standing. Further, there was nothing in either Claimant or Dr. Scarano's testimony that would preclude Claimant being hired as a gate guard, and that once Claimant was hired, he, Williams would not terminate Claimant at the mere request of Employer. (Tr. 175-178).[3] Williams testified that since January, 2001, he has had openings for security monitor positions at Crown and other facilities with 16 to 17 such positions currently available. Further, the job offer was

[3] It is apparent that Williams did not consider Claimant's pain complaints and limitations where as a result of moving about he will have to stay off his feet 2 to 3 days a week. Such activity would obviously prevent Claimant from reporting to work restricting him at best to part time work which was not offered.

contingent upon Claimant passing a background check, drug screen, and registration with the state and that nothing testified to by Dr. Scarano would deprive Claimant of being employed. (Tr. 175, 179-183).

E. Testimony of William L. Quintanilla

Employer called vocational expert, Mr. William L. Quintanilla, who testified that he conducted a telephone interview of Claimant on February 12, 2004, on behalf of Employer as part of a vocational assessment and labor market survey. (Tr. 186, 189, 190). Quintanilla testified he listened to the testimony of Claimant and Dr. Scarano and found nothing in their testimony that would alter the findings of his February 17, 2004 vocational rehabilitation assessment report, which was based on Dodd's telephone interview, plus medical reports from Dr. Gary Freeman of August 27, 1996, the Suchowiecky Center from November 27, 2000 through July 9, 2001, functional capacity evaluation of May 18, 2000 of Progressive Physical Therapy; a work restriction evaluation of Dr. George Hancock, of February 12, 2001, plus Drs. Harper and Scarano reports as previously noted and a job description of Employer.[4]

According to his February 17, 2004 vocational assessment, Mr.Quintanilla interpreted the above documents as follows: Dr. Freeman's report showed Claimant able to work but no addressing any physical restrictions; the Progressive Physical Therapy evaluation showed Claimant capable of light to medium work with the ability to lift up to 28 pounds; the Suchowiecky Center showed Claimant attending work hardening sessions and by July 9, 2001, demonstrating an ability to push and pull up to 50 pounds and lift up to 40 pounds; a February 12, 2001 work restriction evaluation by Dr. George Hancock showed Claimant could not squat, climb, or kneel and was limited to intermittent walking, bending, twisting and standing, and could lift up to 20 pounds. (EX-8, pp. 2, 3, 4). Mr. Quintanilla interpreted Dr. Scarano's and Harper's evaluations as showing major depression in partial remission exacerbated by obesity, alcoholism, and characterological makeup, but not imposing any work restriction if Claimant could physically perform the job in question.

[4] Mr. Quintanilla also did not consider Claimant's pain complaints and limitations because all of the jobs listed involved full time work which Claimant cannot do.

Mr. Quintanilla described Claimant as a 60 years old with past work experience as a refinery operator, salesman, laborer and policeman with about 14 years of education and a Texas driver's license. Based upon the restrictions imposed by Dr. Hancock on February 12, 2001 of no squatting, climbing, kneeling with intermittent walking, bending, twisting and standing, Claimant could allegedly perform sedentary to light work as a security guard, telemarketer, or inside salesman. In addition, Mr. Quintanilla identified the following unskilled light to sedentary jobs which Claimant could allegedly perform: (light) gate guard, production assembler, parking lot attendant, order filler, cashier; (sedentary) dispatcher, order clerk, security clerk, and surveillance system monitor currently paying up to $8.00 per hour.

Mr. Quintanilla then identified the following jobs available to Claimant in the Houston area from March to May, 2001, non commissioned guard at SETEC Protection Service, Guardsmark, Vinson Security, Finger Furniture, and ISSC and electronic assembler at Skill Master paying $6.50 to $10.00 per hour. This was followed by a current labor market survey showing non-commissioned security guards jobs at Guardsmark, Securitas Security Services, plus a part-time cashier position at Wayside, a telemarketer position a Prostar Security, telephone rep and SW Bell Services, inside sales at Business Services and a front desk job at an unidentified hotel paying $6:00 to $10:00 per hour. (Tr. 192-199, EX-8).

4. **DISCUSSION**

A. Contention of the Parties

Claimant contends that although the Board stated that Employer may seek modification, it did not rule on the timeliness of Employer's request, nor the right of Employer once at a modification hearing to seek for the first time to introduce evidence of alleged suitable employment. Claimant contends that Employer's request for modification was untimely since a request for modification can only be made within one year prior to the last date of compensation and since Claimant went almost 3 years without any compensation Employer cannot now seek to modify the previous award of total disability which was rendered by a June 14, 2001 decision.

Further, Claimant argues that Employer failed to introduce evidence of suitable alternative employment at either the initial hearing held on January 13,

1998, or at the first modification hearing held on March 28, 2001. Thus, according to *Lombardi v. Universal Maritime Service Corp.,* 32 BRBS 83 (1998), Employer is precluded in subsequent hearings from seeking to retry its case by submission of suitable alternative employment when it neglected to do so at the prior hearings. Claimant also argues that Employer improperly attempted to show at the current proceeding that he was capable of performing sedentary work without proper medical documentation of Claimant's current condition and with introducing only part of Claimant past medical records.

Concerning the issue of disabling impairments, Claimant contends that he has been disabled due to a combination of physical impairments related to his knee injury, plus knee pain, and accompanying depression which prevent him from working. Claimant introduced no additional medical records, but rather, relied upon past medical records introduced at the March 28, 2001 hearing, on Claimant's request for modification.

Employer never addressed the procedural issues of timeliness of its modification petition, nor of its right to first raise the issue of suitable alternative employment at the present hearing held on March 8, 2004, as opposed to the initial disability hearing held on January 13, 1998, nor the second hearing on Claimant's request for modification held on March 28, 2001, during which Claimant sought total disability from the date of the initial October 24, 1995 injury, and continuing based upon an inability to do his former operator job with Employer combined with Employer's failure to establish suitable alternative employment.

Employer argues Section 22 of the Act permits it to move for modification of a prior compensation order based up on a change in physical condition or an improvement in wage-earning capacity. Employer contends that his right knee has improved as evidenced by records of Dr. Garcia and Dr. Suchowiecky, which shows Claimant complaining about little, or no tenderness or discomfort in his right knee. (EX-1, 2). Further, the Employer showed the existence of jobs as a security guard at its plant in July, 2001, plus, other jobs through the testimony of vocational expert, William Quintanilla. When Claimant turned down the security guard position as its plant in July, 2001, Claimant's disability ceased to be total thereby limiting him a Section 8 scheduled award pursuant to *Potomac Electric Power Co., v. Director (Pepco)* 449 U.S. 268 (1980).

Employer also argues that Claimant's current depression is not causally related to the 1995 knee injury, but rather, to Employer's personnel decisions denying Claimant's work compensation payments which are not compensable,

Marino v. Navy Exchange, 20 BRBS 166 (1988). Claimant's depression is and was not disabling as evidenced by no doctor imposing any work restrictions on Claimant due to depression, with Claimant even admitting he could perform his former job for Employer but for his right knee problems. Further, Claimant from an orthopedic standpoint can perform the gate guard job at its plant as offered to Claimant on July 11, 2001, plus the additional jobs identified by vocational expert, Mr. William Quintanilla.

Employer submitted additional arguments in a supplemental brief of June 17, 2004. However, since this brief was never authorized or solicited by the undersigned and is objected to by Claimant, I reject it and have not considered it in making this determination.[5]

B. Appropriateness of Section 22 Petition for Modification

Section 22 of the Act provides in relevant part:

> Upon his own initiative, or upon the application of any party in interest, (including an employer or carrier which has been granted relief under section 8(f), on the grounds of a change in conditions or because of a mistake in a determination of fact, by the deputy, commissioner, the deputy commissioner may, at any time prior to one year after the date of last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 44 (i) [33 USCS § 944 (i)]) in accordance with the procedure prescribed in respect of claims in section 19 [33 USCS § 919], and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation or award compensation.

[5] In a post hearing letter to the undersigned Claimant objected to the addition of selected medical records by Employer following the hearing. While Claimant is correct is stating that Employer introduced selected medical records from various treating sources, it did so at the hearing and not after the record closed. Claimant also asserted but erroneously that I ordered repayment of pain management medical expenses by Dr. Suchowiecky whereas in fact such repayment was denied and upheld by the Board in its Decision and Order of July 29, 2002 at page 7.

The rationale behind Section 22 is to render justice under the Act by allowing the parties the opportunity to reopen the record for receipt of new evidence. *Moore v. Washington Metro. Area Transit Auth.,* 23 BRBS 49 (1989). The new evidence, however, must relate to either a factual error or a change in Claimant's physical or economic condition and not to alleged mistakes of law. The fact-finder has broad discretion to correct factual errors by considering new or cumulative evidence or by further reflection on the evidence initially submitted. *O'Keefe v. Aerojet-General Shipyards, Inc.,* 404 U.S. 254 (1971). A modification proceeding does not envision allowing parties to allege mistakes of fact or changes in physical, mental, or economic condition simply as a back door to retry a case by withholding facts at the initial hearing and then attempting to introduce them at a subsequent proceeding so as to correct earlier deficiencies and make a better showing. *McCord v. Cephas*, 532 F.2d 1377, 1380, 1381 (D.C. Cir. 1976).

Further it is well established that the party (Employer), requesting modification due to a change of condition has the burden of showing the change in condition. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 28 (1990). The change in condition is measured from the time of the award to the time modification is sought which in this case is from the time of the most recent award on June 14, 2001, to Employer's request for modification on June 19, 2003. Once the moving party submits evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. *See Metropolitan Stevedore Co., v. Rambo,* 515 U.S.291, 296 (1955).

A Section 22 petition for modification may be filed within one year of the last payment of compensation or rejection of a claim. The one year time period within which modification of a denial of a claim must be sought begins to run on the date the decision denying the claim become final, not on the date of the decision. Modification may thus be sought within one year after the conclusion of the appellate process. *Black v. Bethlehem Steel Corp.,* 16 BRBS 138, 142-143n.7 (1984), *appeal dismissed sub nom*. *Black v. Director, OWCP*, 760 F.2d 274 (9th Cir. 1985). Since the initial claim rejection has never been finalized, but has been kept alive by various motions of the parties, Employer's current claim for modification is timely.

However, the problem with the Employer's modification is not one of timeliness, but rather, one where Employer for the first time on a second request for modification seeks to introduce evidence of suitable alternative employment.

(SAE). Clearly Employer had many opportunities to introduce evidence of suitable alternative employment after the first and second hearing but neglected to do so. Employer cannot now seek to present for the first time on modification evidence of SAE to establish a change in Claimant's condition. *Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998). Accordingly, Employer's belated attempt to show SAE is rejected.

Aside from the attempt to introduce SAE, Employer would have the court believe that Claimant's mental condition has improved, and further, that whatever depression remains does not either prevent him from work or is not related to his knee injury, but rather stems from legitimate personnel actions which are not compensable. While Employer is correct that psychological problems caused by legitimate personnel actions are not compensable as set forth in *Marino v. Navy Exchange*, 20 BRBS 166 (1988), the court is convinced that knee pain, while not being the sole cause of Claimant's depression, is nonetheless a significant factor in causing Claimant's depression and as such is work related and compensable. *Director, OWCP, v. Potomac Elec. Power Co., (Brannon)* 607 f. 2d 1378 (D.C. Cir. 1979); *Butler v. District Parking Management Co.* 363 F.2d 682 (D.C. Cir. 1966); *Tampa Ship Repair & Dry Dock v. Director, OWCP,* 535 F.2d 936 (5th Cir.1976).

Medical records from the March 28, 2001 hearing show Claimant being treat by psychiatrist, Dr. Sandra N. McElroy for depression on 3 different occasions, on July 30, 1997, October 27, 1997, and March 26, 1998. Dr. McElroy diagnosed Clamant with a depressive disorder with job related stresses from the work injury and unemployment contributing to condition. When last seen Claimant was complaining about crooked lawyers and had been abusing alcohol. (CX-33). On April 7, 2000, psychologist Dr. John W. Largen administered a battery of tests to Claimant finding a full scale I/Q pf 102 with intact cognitive and academic functioning, and sufficient resources to comprehend his situation, problem solve and communicate but with significant memory difficulties secondary to severe depression and anxiety, both of which adversely affected memory and attention skills. Claimant also demonstrated low average graphomotor speed and set switching ability due to depression. Dr. Largen diagnosed major depressive disorder with anxious features rating Claimant with a moderate (25%) level of psychological and psychiatric impairment which according to Dr. Largen needed to be considered together with Claimant's pain and physical limitations. (CX-31, p. 6).

On April 7, 2000, psychiatrist, Dr. Ishanti, examined Claimant and diagnosed depression with right knee pain and assigned a global assessment of functioning (GAF) of 58. [6] Dr. Ishanti found Claimant's chronic pain to be injury related and noted that Claimant's pain and psychological impairment to compromise Claimant's energy, motivation, and enthusiasm to return to work. Dr. Ishanti recommended medication management, individual, group, biofeedback and massage therapies, vocational counseling, and physical conditioning. (CX-24). In contrast to Drs. Ishanti, McElroy, and Largen, Dr. Scarano found depression, but no job related pain. Dr. Harper diagnosed major depression which was being incompletely treated with antidepressants and which stemmed from the time of Claimant's related injury.

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968); *Louisiana Insurance Guaranty Assn.'s v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In finding that knee pain has and continues to contribute to Claimant's depression, the undersigned agrees with Dr. Harper that the Claimant's current depression stemmed from the job related injury. Indeed, the undersigned gives greater weight to the opinions of treating Drs. Ishanti and McElroy, and psychologist, Dr. Largen that knee pain was and has been associated with the job related injury and subsequent depression. The undersigned credits Claimant's pain complaints and functional limitations finding Claimant to be a sincere and straight forward witness who unfortunately continues to experience severe right knee pain despite minimal use of such. The undersigned also credits treating Drs. Garcia and

[6] A score of 58 places Claimant in the moderate symptom category (e.g. depressed mood and mild insomnia) or moderate difficulty in social, occupational or school functioning (e.g. few friends, conflicts with peers or co-workers.

Suchowiecky statements relating Claimant's knee pain to depression and the job related injury.

Although, Employer's medical expert, Dr. Scarano testified that Claimant's current depression was related to ongoing claim litigation, i.e., Claimant's reaction to Employer's personnel decisions in denying him workmen's compensation benefits, and not to knee pain, the undersigned does not credit Dr. Scarano in that regard finding such testimony to be inconsistent with the credible testimony of Claimant's treating physician Drs. Garcia, Suchowiecky, and Ishanti. Further, the record contains scant evidence to support his contention that he questioned Claimant, who is in the best position to know the degree of discomfort and right knee pain, whether he has continued to experience right knee pain since the injury and whether it was related to his depression.[7] Rather the court relies upon Drs. Garcia, Suchowiecky, Shanti, Largen, and McElroy's opinions, all of whom relate Claimant's depression to knee pain. While ongoing claim litigation has been a major cause of continued depression, severe knee pain (including left knee pain from a work related 1992 job injury) has also been a continuing and contributing cause of this depression notwithstanding there have been times when this condition may have fluctuated. Indeed, the knee pain has severely limited Claimant's ability to move about restricting him at best to light to sedentary work as noted by Mr. Quintanilla.

While Employer would have the undersigned believe that Claimant has undergone mental and physical improvement, Claimant's GAF scores of 58 in April, 2000, to a GAF of 50 in January, 2004, indicate a deterioration in Claimant's mental health going from moderate to serious impairment levels with a decline in physical potential going from an ability in February, 2001, to no squatting, climbing, or kneeling with intermittent walking, bending, twisting and standing, and lifting up to 20 pounds, to one where he has to stay off his knees with minimal walking up to 5 minutes and not on uneven surfaces combined with difficulty moving around when getting up from a seated position. Moreover, due to severe knee pain, Claimant has 2 or 3 bad days a week where he is prevented from walking.

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[7] While Dr. Scarano claims he asked Claimant during the interview how he felt and whether his right knee pain was associated with or a cause of the depression. Claimant stated he had no recall of such questioning. (Tr. 128). At page 3 and 4 of Exhibit 5, .Dr. Scarano noted in his report that Claimant told him that Dr. Suchowiecky's treatment was helpful in relieving his pain and depression. However, there is no apparent questioning about the level of knee pain Claimant experienced before, during, or after Dr. Suchowiecky's treatment. Indeed, Dr. Scarano notes Claimant being treated by Dr Suchowiecky in 2000, 2001, and 2002 for depression with increased pain as late as January 8, 2002, while failing to explain how knee pain would not be associated with Claimant's depression. (EX-5, pp. 11, 14, 15).

From a purely physical standpoint the previous medical records from Drs. Landon and Garcia, as well as a new functional capacity evaluation of Dr. George Hancock relied upon by Employer showed Claimant has never been able to physically do his former job, thereby establishing a *prima facie* case of total disability from January 17, 1996 to the present. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); P&M Crane Co., v. Hayes, 930 F.2d 424, 429-30 (5th Cir. 1991); SGS Control Serv., v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986). In this case, even based upon Dr. Hancocks FCE of February 12, 2001, there is no question that Claimant has not been able to physically perform his past dockside work.

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment (SAE). Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT)(D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). As already noted above, Employer failed to timely document SAE.

However, assuming arguendo that it was appropriate for Employer to introduce evidence of the gate guard position plus additional jobs provided by Mr. Quintanilla, Employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F2d.1031, 1038 (5th Cir.1981). If the employer offers suitable work, the judge need not examine employment opportunities on the open market.

In the present case, the undersigned is convinced that Claimant cannot perform the gate guard job as offered by Mr. Jack Williams or the jobs as mentioned by Mr. Quintanilla due to serious knee pain limitations, wherein

Claimant has to stay off his feet 2-3 days a week. Even assuming Claimant could physically do some of the gate guard positions for 2 or 3 days per week, the evidence of GAF of 50 raises serious questions about Claimant's ability to keep a job if hired especially if Claimant continues to consume 2 liters of whiskey per week.[8]

In essence, the undersigned is convinced Employer failed to establish positive changes in Claimant's physical, mental, or economic condition such that Claimant could be found able to work. Moreover, even assuming Employer demonstrated physical, mental or economic changes Claimant has shown an inability to do his former work, including security jobs at Employer's facility and those positions named by Mr. Quintanilla.

IV. ORDER

Accordingly based upon the foregoing findings of fact and conclusions of law and the entire record, the undersigned hereby denies Employer's petition for modification.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

[8] While noting alcoholism to be a major and long standing problem for Claimant, Dr. Scarano provided minimal analysis of this condition and impact upon work.